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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

TIMOTHY ANDREW KELLIS,)	
)	No. 41034
Petitioner-Appellant,)	
)	Latah Co. Case No.
vs.)	CV-2010-920
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF LATAH

HONORABLE JOHN R. STEGNER
District Judge

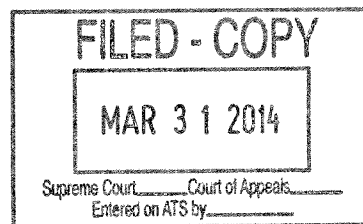
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STATEMENT OF THE CASE

Nature of the Case

Timothy A. Kellis appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts and course of proceedings underlying Kellis' convictions as follows:

Kellis was initially charged with ten counts of lewd and lascivious conduct with a minor under sixteen, Idaho Code § 18–1508, and two counts of sexual abuse of a child, I.C. § 18–1506, for misconduct with teenage boys, much of which occurred at a Boy Scout camp where Kellis was a staff member. Subsequently, one of the ten lewd conduct counts was amended to attempted lewd conduct with a minor under sixteen, I.C. §§ 18–306 and 18–1508. Kellis pleaded not guilty to all charges and went to trial before a jury. He was found guilty of all counts. The district court imposed concurrent unified sentences of life with fifteen years fixed for each of the nine counts of lewd conduct, fifteen years with five years fixed for the count of attempted lewd conduct, and twenty-five years with fifteen years fixed for each of the two counts of sexual abuse.

State v. Kellis, 148 Idaho 812, 813-814, 229 P.3d 1174, 1175-1176 (Ct. App. 2010).

After the Idaho Court of Appeals affirmed his convictions and sentences (Id.), Kellis filed a *pro se* petition for post-conviction relief. (R., Vol. I, pp.14-52). The district court appointed counsel, and later substitute counsel, to represent Kellis. (R., Vol. I, pp.156-159, 166-167, 186-188.) Through appointed counsel, Kellis filed an amended and second amended petition for post-conviction relief. (R., Vol. I, pp.190-197; Vol. II, pp.313-320.) Kellis asserted 12 claims of

ineffective assistance of trial counsel, and one claim of ineffective assistance of appellate counsel. (R., Vol. II, pp.313-320.)

The state moved for summary dismissal of Kellis' petition, asserting that Kellis failed to allege facts that would entitle him to relief under the applicable Strickland v. Washington, 466 U.S. 668, 687-88 (1984) standard as to any of his claims. (R., Vol. I, pp.198-232.¹) The district court granted the state's motion. (R., Vol. II, pp.425-441.) Kellis timely appealed. (R., Vol. II, pp.442-445.)

¹ The state moved to dismiss Kellis' first amended petition for post-conviction relief. (R., Vol. I, pp.198-232.) Kellis subsequently filed a second amended petition in which he alleged he was denied effective assistance of counsel as guaranteed by the Idaho Constitution as well as the United States Constitution. (See 10/16/12 Tr., R., Vol. II, pp. 313-320.) The state did not file an additional response or motion to dismiss with regard to the second amended petition, but referred to its previous brief in the hearing on its motion to dismiss the second amended petition. (10/16/12 Tr., p.4, Ls.18-21.)

ISSUE

Kellis states the issue on appeal as:

Did the district court err in summarily dismissing Mr. Kellis's petition without proper notice per I.C. § 19-4906(b)?

(Appellant's brief, p.2)

The state rephrases the issue on appeal as:

Has Kellis failed to show the district court dismissed his ineffective assistance of counsel claims on grounds entirely independent from those set forth by the state in its motion for summary dismissal?

ARGUMENT

Kellis Has Failed To Show The District Court Dismissed His Ineffective Assistance Of Counsel Claims On Grounds Entirely Independent From Those Set Forth By The State In Its Motion For Summary Dismissal

A. Introduction

Kellis contends that the district court summarily dismissed four of his ineffective assistance of counsel claims on grounds distinct from those set forth by the state in its motion for summary dismissal, thus depriving him of required notice. (See generally Appellant's brief.) However, a review of the record reveals that the district court dismissed Kellis' claims on substantially similar grounds as set forth by the state – that Kellis failed to allege facts satisfying the applicable Strickland standard for ineffective assistance of counsel claims. Further, even if the court did dismiss the petition entirely independent grounds, any such error is harmless.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. The District Court Dismissed Kellis' Ineffective Assistance Of Counsel Claims On Substantially Similar Grounds As Set Forth By The State

The district court may, on a party's motion or its own initiative, summarily dismiss a petition for post-conviction relief. I.C. § 19-4906; Ridgley v. State, 148 Idaho 671, 675, 227 P.3d 925, 929 (Ct. App. 2010). The procedure for summary dismissal is equivalent to that for a summary judgment motion under I.R.C.P. 56. Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted). Thus, dismissal is appropriate on determination that no "genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Id.

Where the district court summarily dismisses a post-conviction petition on its own motion, a petitioner is entitled to notice of the basis for the dismissal, and 20 days to respond. I.C. § 19-4906(b). If the state moves to dismiss, the motion serves as notice for which petitioner may respond under I.C. § 19-4906(c). Buss v. State, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). The petitioner is entitled to a twenty-day period of time to respond to the state's motion. State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Isaak v. State, 132 Idaho 369, 370, 972 P.2d 1097, 1098 (Ct. App. 1999). If the district court dismisses on grounds other than those articulated in the state's motion, the petitioner must be given additional notice and an opportunity to respond pursuant to I.C. § 19-4906(b). Id.

In Kelly v. State, 149 Idaho 517, 236 P.3d 1277 (2010), the Idaho Supreme Court clarified the distinction in post-conviction appeals between a claim of insufficient notice of the grounds for summary dismissal, and a claim that there was *no* notice of the grounds for summary dismissal. An appellant may not

challenge the sufficiency of the notice contained in the state's motion for summary disposition and accompanying memoranda for the first time on appeal. Id. at 521-522, 236 P.3d at 1281-1282 (citing DeRushe v. State, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009)). An appellant may, however, assert for the first time on appeal that he did not receive *any* notice of dismissal, i.e., that the district court dismissed the petitioner's claims on grounds *entirely independent* from the ground he was provided notice of in the state's motion and supporting briefs. Id.

In Kelly, the Idaho Supreme Court held that the appellant failed to show the district court dismissed the post-conviction claims on *entirely independent* grounds where the state provided the applicable Strickland ineffective assistance of counsel standard,² cited Idaho law regarding ineffective assistance of counsel claims; and where the district court held that “Kelly has not provided specific facts to show that [Kelly's attorney's] behavior fell below an objective standard of reasonable representation, and that such a claim was 'unsupported by the record.’” Id. at 522-524, 236 P.3d at 1282-1284. The Idaho Supreme Court also held that “[w]hen a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements.” Id. at 523, 236 P.3d at 1283 (emphasis in original, citations omitted)).

In the present case, because Kellis failed to preserve any claim that the state's motion to dismiss provided insufficient notice of summary dismissal, he

² Pursuant to Strickland v. Washington, 466 U.S. 668, 687-88 (1984), a post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice.

must meet the more stringent standard of showing that the district court dismissed the claims in question on *entirely independent* grounds than set forth by the state. Kellis cannot make such a showing.

The state moved for summary dismissal of Kellis' post-conviction petition on December 13, 2011. (R., Vol. I, pp.198-233.) Prior to discussing Kellis' claims individually, the state cited the applicable Strickland standard and cited Idaho law relating to ineffective assistance of counsel claims. (R., Vol. I, pp.203-208.) The state concluded, "Kellis' claims fail to raise any genuine issues of material fact regarding both deficient performance and resulting prejudice." (R., Vol. I, p.221.) At the hearing on the state's motion for summary dismissal, the state further summarized, "[i]t's not a key to the prison for a defendant who can dredge up a long series of examples how the case might have been tried better." (2/12/13 Tr., p.18, Ls.19-22.)

On April 10, 2013, after the submission of additional argument and evidence (R., Vol. II, pp.325-388, 419-422), the district court summarily dismissed Kellis' petition. (R., Vol. II, pp.425-441). After addressing each of Kellis' claims individually, the court summarized that Kellis "has not presented any claims that raise a question of fact as to both prongs of the *Strickland* test." (Id.) Kellis thus had notice of the court's grounds for dismissal: that he failed to allege facts, which if true, would satisfy the Strickland standard.

A review of the individual claims at issue further demonstrates that the district court dismissed the claims on substantially similar grounds as set forth by the state. While the district court, in some instances, approached the Strickland

analysis in different ways than did the state, the court's reasoning for dismissal was not so distinct as to transform its decision into a *sua sponte* dismissal that required additional notice.

1. Trial Counsel's Failure To Present Evidence That The Victims Previously Made A Timely Accusation Of Sexual Misconduct Against The Camp Director

In his first post-conviction claim, Kellis asserted his trial counsel was ineffective for failing to investigate and present evidence that the victims made allegations of sexual misconduct against the camp director the previous summer. (R., Vol. II, pp.314-315.) Such evidence, Kellis argued, “would have had a very significant effect on the credibility” of the victims. (Id.) In support of this claim, Kellis submitted a copy of a letter he claims to have sent the summer before he was charged, in which he discussed the accusations made by some campers against the camp director. (R., Vol. II, pp.314-315, 335-336.)

In moving for summary dismissal of this claim, the state questioned the authenticity of the letter, and argued that even to the extent the letter and the assertions contained within were genuine, they did not support Kellis' claim that his trial counsel's performance was deficient. (R., Vol. I, pp.209-210.) Specifically, the state noted that not all of the victims were mentioned in the letter, and that the accusations contained within the letter were relatively benign relative to Kellis' conduct (i.e., that the camp director looked and entered into campers' tents without permission.) (R., Vol. I, pp.209-210.)

In its order summarily dismissing Kellis' petition, the district court concluded that Kellis failed to sufficiently allege facts that would satisfy the

Strickland standard with regard to this claim. (R., Vol. II, pp.429-430.) Specifically, the court concluded that Kellis both failed to adequately support the factual allegations underlying the alleged counsel deficiency, and failed to assert prejudice. (Id.) The district court also pointed out that the prior accusations made against the camp director *were* discussed at trial, and were referenced during Kellis' closing argument. (Id.)

The district court thus dismissed this claim on substantially similar grounds as set forth by the state. Both the district court and the state characterized the letter as having minimal exculpatory value. This characterization addresses both prongs of a Strickland analysis – because the exculpatory value of the letter was at best, minimal, trial counsel was not deficient for failing to investigate the matter further; *and* neither the letter nor further investigation of the accusations would have resulted in an acquittal. Therefore, Kellis has failed to show that the district court dismissed this claim on grounds entirely independent of those set forth by the state.

2. Trial Counsel's Failure To Obtain The Assistance Of An Expert To Examine The Conduct Of The Victims

In his third post-conviction claim, Kellis asserted his trial counsel was ineffective for failing to obtain an expert witness to examine the conduct of the four victims “with respect to their failure to make their allegations until approximately eight months after the alleged events in light of their having made similar accusations the prior year.” (R., Vol. II, p.316.) In other words, Kellis argued his trial counsel was constitutionally ineffective for failing to retain an expert to attack the victim's credibility.

In moving for summary dismissal of this claim, the state argued that Kellis' allegation was "speculative, bare, conclusory, unsubstantiated by any fact, and [was] inadequate to entitle him to an evidentiary hearing." (R. Vol. I, p.213.) The state also argued that Kellis failed to identify how the lack of calling an expert to examine the behavior of the victims adversely effected his case. (Id.) The state thus touched upon both prongs of Strickland, in that it asserted that Kellis' allegations were insufficient to establish trial counsel was deficient, and that he failed to assert prejudice.

In its order summarily dismissing Kellis' petition, the district court similarly found that Kellis failed to allege facts sufficient to satisfy the deficiency prong of the Strickland test by failing to present evidence that counsel's decision was based upon "inadequate preparation, ignorance of the law, or some other objective shortcoming." (R., Vol. II, p.432.)

The district court thus dismissed this claim on substantially similar grounds as set forth by the state. Both the district court and the state recognized that Kellis failed to establish a *prima facie* case with regard to the alleged deficient performance of his trial counsel. Therefore, Kellis has failed to show that the district court dismissed this claim on grounds entirely independent of those set forth by the state.

3. Trial Counsel's Failure To Obtain An Expert To Determine Whether There Was DNA Or Other Physical Evidence On The Property Of the Victims

In his seventh post-conviction claim, Kellis asserted his trial counsel was ineffective for failing to retain an expert to determine whether there was any

physical evidence, such as Kellis' DNA, on any of the victims' property, including their sleeping bags. (R., Vol. II, p.317.)

In moving for summary dismissal of this claim, the state argued that Kellis' allegation was "speculative, bare, conclusory, unsubstantiated by any fact, and [was] inadequate to entitle him to an evidentiary hearing." (R., Vol. I. p.215.) The state also pointed out that not all of the incidents of Kellis' sexual misconduct took place in the boys' tents, and there was no testimony or other evidence of ejaculation. (Id.)

In its order summarily dismissing Kellis' petition, the district court similarly found that Kellis failed to allege facts sufficient to satisfy the deficiency prong of the Strickland test, in that in that he failed to present evidence that counsel's decision was based upon "any objective shortcoming." (R., Vol. II, pp.434-435.) The district court also pointed out that a significant amount of time passed between the sexual misconduct and the filing of criminal charges, which limited the potential usefulness of scientific testing, since "DNA not appearing the following April would have had little effect on the trial." (Id.)

The district court thus dismissed this claim on substantially similar grounds as set forth by the state. Specifically, both the state and the district court characterized any potential DNA testing as having limited exculpatory value. This characterization pertains to both prongs of a Strickland analysis. Because the absence of Kellis' DNA in the tents or sleeping bags would have had minimal exculpatory value, Kellis' trial counsel was not deficient to decline to retain an expert for the purpose of finding such evidence, and further, Kellis cannot show

that such evidence would have resulted in an acquittal. Therefore, Kellis has failed to show that the district court dismissed this claim on grounds entirely independent of those set forth by the state.

4. Trial Counsel's Failure To Call A Witness To Contradict Certain Testimony, And Failure To Object To That Testimony

In his ninth post-conviction claim, Kellis asserted his trial counsel was ineffective for: (a) failing to call a particular witness to contradict testimony that Kellis provided alcohol to one of his victims, and (b) failing to object to such evidence on relevance grounds. (R., Vol. II, pp.317-318.)

In moving for summary dismissal of this claim, the state argued that the evidence that Kellis provided alcohol to one of the victims was relevant to demonstrate Kellis' grooming behavior. (R., Vol. I, pp.216-217.) The state also asserted Kellis failed to demonstrate either deficiency or prejudice with regard to his trial counsel's failure to object to the victim's testimony about alcohol because evidence of Kellis' guilt was overwhelming, and because exclusion of the testimony would not have impacted the outcome of the trial. (Id.)

In its order summarily dismissing Kellis' petition, the court concluded that Kellis failed to allege facts sufficient to satisfy the Strickland test with regard to his claim that his trial counsel was ineffective for failing to present testimony contradicting the victim's testimony. (R., Vol. II, p.437.) Specifically, the court found that any evidence that Kellis had *not* provided alcohol to one of the victims would have "had very little, if anything, to do with the results of this trial." (Id.)

The district court thus dismissed this claim on substantially similar grounds as set forth by the state. On appeal, Kellis contends that the state expressly

discussed only counsel's failure to object, while the district court expressly discussed only counsel's failure to present contradictory testimony. (Appellant's brief, pp.9-10.) However, while the state focused its argument on counsel's failure to object, the heading of the relevant section of the motion expressly refers to Kellis' other sub-claim, that counsel failed to present contradictory testimony. (R., Vol. I, p.216.) In any event, the rationale of the state and the court overlapped to a significant degree. Both the state and the court recognized that in the grand scheme of the facts adduced at trial, evidence that Kellis supplied one of the victims with alcohol during a trip, while relevant, had minimal inculpatory value. (R., Vol. I, pp.216-217; R., Vol. II, p.437.) Therefore, Kellis could not show that testimony contradicting that assertion, or even a successful objection to the testimony, would have resulted in an acquittal.

Kellis has failed to show that the district court summarily dismissed any of the four challenged claims on grounds entirely independent from those set forth by the state. He has therefore failed to show that he had *no* notice regarding the summarily dismissal of these claims.

D. Even If The District Court Dismissed the Ineffective Assistance of Counsel Claims on Entirely Independent Grounds, Any Such Error Is Harmless

If a petitioner is "not left with an 'invisible target' and is able to respond in a meaningful way to the district court's notice of intent to dismiss," then any lack of adequate notice is harmless. Baker v. State, 142 Idaho 411, 422-423, 128 P.3d 948, 958-959 (Ct. App. 2005); see also Franck-Teel v. State, 143 Idaho 664, 671, 152 P.3d 25, 32 (Ct. App. 2006) ("Nevertheless, if Franck-Teel's response to

the state's motion for summary dismissal reveals that she understood the basis for dismissal..., then we will conclude that the inadequacy of notice was harmless error.").

In this case, to the extent the district court's expressed rationale for dismissal was so distinct from the grounds set forth by the state as to render the court's order a *sua sponte* dismissal, any such error is harmless. Kellis had full opportunity to present evidence and argument as to how he could satisfy the deficiency and prejudice prongs of Strickland. Further, Kellis has not attempted to describe what type of argument or evidence he would have presented if only he had more precise notice of the grounds for the district court's dismissal of these claims. Finally, Kellis' response to the state's motion for summary dismissal reveals that he did understand that the basic grounds for the claims' ultimate dismissal was application of Strickland, as opposed to timeliness, or waiver, or any other grounds. (See R., Vol. II, pp.390-416.)

Because Kellis was not left with an "invisible target," and had the opportunity to respond in a meaningful way to the state's argument that he had failed to establish a *prima facie* case regarding the Strickland standard as to any of his claims, any error regarding required notice of the summary dismissal of those claims is harmless.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Kellis' petition for post-conviction relief.

DATED this 31st day of March, 2014



MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of March, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE
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MARK W. OLSON
Deputy Attorney General

MWO/pm